

at the location(s) specified in the attestation, and at the "required wage rate." The employer shall provide a copy of the accepted attestation to the DSO at each educational institution from which it hires any F-1 student(s).

(3) The DSO may grant work authorization for an F-1 student to be employed by a particular attesting employer for the duration of the F-1 student's course of study or until September 30, 1996, whichever period is shorter, provided the F-1 student continues to be employed by the attesting employer and is otherwise eligible for F-1 student work authorization as determined by the Attorney General.

(i) *Withdrawal of accepted attestations.*

(1) An employer who has submitted an attestation which has been accepted for filing may withdraw such attestation at any time before the expiration of the validity period of the attestation, unless the Administrator has found reasonable cause to commence an investigation of the attestation under subpart K of this part. Requests for such withdrawals shall be in writing and shall be directed to the Regional Certifying Officer with whom the attestation was filed.

(2) Upon the Regional Certifying Officer's receipt of an employer's written request to withdraw an attestation, it shall be the employer's responsibility to promptly notify the DSO at each school where F-1 students it employs are enrolled.

(3) Withdrawal of an attestation shall not affect an employer's liability with respect to any failure to meet the conditions attested to which took place before the withdrawal, or for material misrepresentations in an attestation. However, if an employer has not yet employed any F-1 student(s) pursuant to the attestation, the Administrator shall not find reasonable cause to investigate unless it is alleged, and there is reasonable cause to believe, that the employer has made material misrepresentations in the attestation.

(j) *Invalidation of filed attestation.* Invalidation of an attestation may result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart K of this part (*i.e.*, investigation(s) conducted by the Administrator regarding the employer's mate-

rial misrepresentation of an attestation element or failure to pay wages in accordance with attestation). Invalidation of an attestation may also result where ETA determines that the attestation is unacceptable and the employer fails to resubmit the attestation to ETA within 15 days.

(1) *Result of Wage and Hour Division action.* Upon a determination of a violation under subpart K of this part, the Administrator shall notify ETA and shall notify the Attorney General of the violation and of the Administrator's notice to ETA.

(2) *Result of ETA action.* If, after accepting an attestation for filing, ETA finds that it is unacceptable because it falls within one of the categories set forth at paragraph (f)(2)(i) of this section, ETA shall return the attestation to the employer for correction and resubmission within 15 days. If the employer fails to resubmit the attestation within 15 days of the date of the notification, ETA shall invalidate the attestation. ETA shall notify the Attorney General of such invalidation. Where the attestation has been invalidated, ETA shall return a copy of the attestation form to the employer, or the employer's agent or representative, and shall notify the employer in writing of the reason(s) that the attestation is invalidated. When an attestation is invalidated pursuant to paragraph (f)(2)(ii) of this section, ETA shall invalidate all attestations filed by the employer. Such action shall be the final decision of the Secretary of Labor and is not subject to appeal.

(k) *Employers subject to disqualification.* No attestation shall be accepted for filing from an employer which has been found to be disqualified from participation in the F-1 student work authorization program as determined in a final agency action following an investigation by the Administrator pursuant to subpart K of this part.

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[56 FR 56865, 56876, Nov. 6, 1991, as amended at 59 FR 64777, Dec. 15, 1994; 60 FR 61210, 61211, Nov. 29, 1995]

**§ 655.950 Public access.**

(a) *Public examination at ETA.* ETA shall compile and maintain a list of

employers who filed attestations specifying the occupation(s), geographical location, and wage rate(s) attested to. The list shall be available for public inspection at the ETA office at which the attestation was filed and such list shall be updated monthly.

(b) *Notice to Public.* ETA shall publish semiannually a list in the FEDERAL REGISTER of employers which have been disqualified from participating in the F-1 student work authorization program pursuant to § 655.940(k) of this part.

#### APPENDIX A TO SUBPART J TO PART 655—DOCUMENTATION IN SUPPORT OF ATTESTATIONS MADE BY EMPLOYERS

This appendix sets forth the documentation that the Department of Labor considers to be sufficient to satisfy the employer's burden of proof regarding substantiate attestations made on Form ETA-9034, pursuant to subpart J of this part, provided the documentation is found to be truthful, accurate, and substantiates compliance. The employer retains the right to meet its burden of proof in proving its attestations through other sufficient means. The employer's failure to substantiate its attestation in the event of an investigation shall be found to be a violation.

(a) *Documenting the first attestation element.* The employer shall have the burden of proving that it has complied with the recruitment requirements described in regulations at § 655.940(d)(1) of this part and attested to on ETA Form-9034. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(1) Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§ 655.900(b)(3) and 655.1000(c) of this part. To be effective in satisfying the burden of proof, the documentation should be contemporaneous with the recruitment, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(2) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the recruitment, the employer should maintain the documentation for a period of no less than 18 months after the close of the recruitment period or, in the event of an investigation, for the period of the enforcement proceeding under subpart K of this part.

(3) The employer should be able to produce the following documentation:

(i) Evidence that a job order for the position was on file with the SESA local office within the area of intended employment for at least 60 consecutive days. Such evidence of a job order should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(ii) Evidence that a vacancy notice announcing the position was posted for 60 consecutive days at the worksite. Evidence should include a copy of the notice that was posted at the worksite, the dates when the notice was posted, and a description of the specific location at the worksite at which the notice was posted.

(iii) Evidence that a job order for the position was continuously on file and "open" with the SESA local office within the area of intended employment, throughout the validity period of the attestation. Such evidence should include the employer's contemporaneous written statement setting forth the name and address of the SESA office with which the job order was placed; the name of the SESA employee with whom the job order was placed; the date on which the order was placed; and the dates on which the job order was on file with the SESA office.

(iv) Evidence that the employer was unsuccessful in recruiting a sufficient number of U.S. workers who are able, qualified, and available for the position(s) through the SESA job order and the worksite posting notice. Such evidence should include a contemporaneous written summary of the results of recruitment for each position for which an attestation was filed by the employer. Such summary should include:

(A) The number of job openings in each occupation included in the occupation;

(B) The number of U.S. workers and F-1 students that applied for each position;

(C) The number of U.S. workers that were hired;

(D) The number of F-1 students that were hired;

(E) The number of U.S. workers that were not hired; and

(F) The lawful job-related reason(s) for which each U.S. worker was not hired. An example of a job-related reason for which a U.S. worker can be rejected for a job opportunity is that the U.S. worker does not have the training and experience required for the position.

(4) *Investigations.* In the event that an investigation is conducted pursuant to regulations at subpart K of this part, concerning whether the employer failed to satisfy its recruitment requirement, in that it failed to conduct recruitment or to hire qualified U.S.

worker(s) for a position for which an F-1 student(s) was hired, the Administrator shall determine whether the employer has produced documentation sufficient to prove the employer's compliance with the attestation requirements.

(i) Where the focus of the investigation is upon whether recruitment was conducted, the employer shall have satisfied its burden of proof if the documentation described in paragraphs (a)(3) (i), (ii), and (iii) of this appendix is produced, provided the documentation is found to be truthful, accurate and substantiates compliance.

(ii) Where the focus of the investigation is upon whether the employer's recruitment of U.S. workers was unsuccessful because the employer declined to hire U.S. worker(s) without lawful reason(s) for such action, the employer shall have satisfied the burden of proof if the documentation described in paragraph (a)(3)(iv) of this appendix is produced, provided that the Administrator has no significant evidence which reasonably shows that the employer's recruitment or hiring was deficient. In determining whether the employer has demonstrated that U.S. workers were rejected for lawful job-related reasons, the Administrator may contact ETA which shall provide the Administrator with advice as to whether U.S. workers were properly rejected.

(b) *Documentation of the second attestation element.* The employer shall have the burden of proving the validity of and compliance with the attestation element referenced in §655.940(e) of this part and attested to on Form ETA-9034.

(1) The employer shall be prepared to produce documentation sufficient to satisfy this requirement. Documentation shall not be submitted to ETA or to the DSO with the attestation, but shall be made available to DOL as described in §§655.900(b)(3) and §655.1000(c) of this part. The documentation specified in paragraphs (b) (4) and (5) of this appendix will be sufficient to satisfy the employer's burden of proof, provided the documentation is found to be truthful, accurate and substantiates compliance upon investigation. The employer's failure to satisfy the burden of proof through the production of adequate documentation shall be found to be a violation.

(2) To be effective in satisfying the employer's burden of proof regarding the determination of the prevailing wage, the employer's documentation should be contemporaneous with the determination or the annual update of the prevailing wage, not created after the fact and particularly not after the commencement of an investigation under subpart K of this part.

(3) Because complaints may be filed and enforcement proceedings may be conducted during a considerable period after the determination or the annual update, the employer

should be prepared to produce documentation for a period of no less than 18 months after the determination or update, or in the event of an investigation, for the period of the enforcement proceedings under subpart K of this part.

(4) Documentation described in paragraphs (b) (1) through (3) of this appendix should consist of the following:

(i) If the position is in an occupation which is the subject of a wage determination in the area under the provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, (see 29 CFR part 1) or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*, (see 29 CFR part 4), an excerpt from the wage determination showing the wage rate for the occupation in the area of intended employment; or

(ii) If the position is covered by a union contract which was negotiated at arms-length between a union and the employer, an excerpt from the union contract showing the wage rate(s) for the occupation(s) set forth in the union contract.

(iii) If position is not covered by the provisions of paragraph (b)(4) (i) or (ii) of this appendix, the employers's documentation shall consist of:

(A) A prevailing wage finding from the SESA for the occupation within the area of employment; or

(B) A prevailing wage survey for the occupation in the area of intended employment published by an independent authoritative source as defined in §655.920 of this part. For purposes of this paragraph (b)(4)(iii)(B) "prevailing wage survey" means a survey of wages published in a book, newspaper, periodical, looseleaf service, newsletter, or other similar medium, within the 24-month period immediately preceding the filing of the employer's attestation and each succeeding annual prevailing wage update. Such survey shall:

(1) Reflect the average wage paid to workers similarly employed in the area of intended employment;

(2) Be based upon recently collected data, e.g., within the 24-month period immediately preceding the date of publication of the survey; and

(3) Represent the latest published prevailing wage finding by the authoritative source for the occupation in the area of intended employment.

(5) The employer should be prepared to produce documentation to prove the payment of the required wage, including payroll records, commencing on the date on which the employer first employs the F-1 student, showing the wages paid to employees in the occupation(s) named in the attestation at the worksite. Such payroll records maintained in accordance with regulations under the Fair Labor Standards Act (see 29 CFR part 516) would include for each employee in the occupation:

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(i) The rate(s) of pay, including shift differentials, if any;

(ii) The employee's earnings per pay period;

(iii) The number of hours worked per week by the employee; and

(iv) The amount of and reasons for any and all deductions made from the employee's wages.

(6) *Investigations.* In the event that an investigation is conducted pursuant to subpart K of this part, concerning whether the employer made a material misrepresentation regarding the required wage or failed to pay the required wage, the Administrator shall determine whether the employer has produced documentation sufficient to satisfy the burden of proof.

(i) The employer's documentation of the prevailing wage determination shall be found to be sufficient where the determination is pursuant to the Davis-Bacon Act or Service Contract Act wage determination or a SESA determination.

(ii) Where the employer's prevailing wage determination is based on a survey by an independent authoritative source, the Administrator shall consider the employer's documentation to be sufficient, provided that it satisfies the standards for independent authoritative source surveys and is properly applied, and provided further that the Administrator has no significant evidence which reasonably shows that the prevailing wage finding obtained by the employer from an independent authoritative source varies substantially from the wage prevailing for the occupation in the area of intended employment. In the event such significant evidence shows a substantial variance, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for the determination as to violations. ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable to the occupation under investigation.

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### Subpart K—Enforcement of the Attestation Process for Attestations Filed by Employers Utilizing F-1 Students in Off-Campus Work

SOURCE: 56 FR 56872, 56876, Nov. 6, 1991, unless otherwise noted.

### § 655.1000 Enforcement authority of Administrator, Wage and Hour Division.

(a) The Administrator shall perform all the Secretary's investigative and enforcement functions under section 221 of the Act and subparts J and K of this part.

(b) The Administrator shall conduct such investigations as may be appropriate and, in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary to determine compliance with section 221(a) of the Act and subparts J and K of this part.

(c) An employer being investigated pursuant to this subpart shall have the burden of proof as to compliance with section 221(a) of the Act and the validity of its attestation, and in this regard shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of section 221 of the Act and subparts J and K of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to section 221 of the Act or subpart J or K of this part. Any such interference shall be a violation of the attestation and subparts J and K of this part, and the Administrator may take such further actions as the Administrator deems appropriate.

NOTE: Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) An employer subject to subparts J and K of this part shall at all times cooperate in administrative and enforcement proceedings. No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person because such person has:

(1) Filed a complaint or appeal under or related to section 221 of the Act or subparts J or K of this part;